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May 27, 2016

BY FACSIMILE —FILED EX PARTE & UNDER SEAL

Honorable P. Kevin Castel
United States District Judge
Southern District of New York
Daniel Patrick Moynihan Federal Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: United States v. Jason Galanis et al., 15 Cr. 643 (PKC)

Dear Judge Castel:

Pursuant to our limited appearance on the issue of bail, we write to respectfully request that the Court stay its order revoking bail and detaining Jason Galanis pending appeal. We write the Court in advance of Mr. Galanis' Notice of Appeal, which will be filed on Tuesday, May 31, 2016, within the requisite time frame required by the Federal Rules of Appellate Procedure. This request is made *ex parte* and under seal due to prior filings with the Court, the sealing order of the District Court in the Central District of California and the sensitive nature of some of the matters discussed.[1]

The Court's Alternative Bases for Its Order of Detention

Defendant Jason Galanis requests a stay pending appeal of the order revoking his bail and detaining him pending trial. He respectfully submits that the two separate and alternative reasons cited by the Court for imposing detention lack a proper legal and factual basis. We note further that there are conditions that could assure the safety of the community during a stay pending appeal, including those proposed at oral argument.

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[1] One basis for the Court's order revoking bail refers to the Probation ordered by Judge Real in the Central District of California ("CADC"). Inasmuch as I am advised that Judge Real's order is itself under seal [redacted] REDACTED [redacted] In sum, because one of the Court's bases is related to matters placed under seal by Judge Real, we request that this submission be placed under seal. A copy has been sent by email to Assistant U.S. Attorney Brian Blais.

A. The Court's First Basis for Revoking Bail

The Court based its first reason for revoking bail on the conclusion that "a preponderance of the evidence" at the detention hearing establishes "there is probable cause to believe that Mr. Jason Galanis has committed federal crimes set forth in a complaint[2] ... in part while on release on the pending indictment." (Order, attached hereto as Exhibit A, at 2). The order references the transcript (attached hereto as Exhibit B), but neither sets forth in writing why or how Jason Galanis violated any bail condition on the basis of the new complaint lodged against him. Nor does either adequately set forth the basis for finding probable cause that "the crimes set forth in [the] complaint" were committed "in part" while Mr. Galanis was on release.

The new complaint alleges that Mr. Galanis was part of a fraudulent conspiracy to issue and sell tribal bonds, purportedly to misappropriate funds. The 45-page new complaint sets forth approximately 25 acts by Mr. Galanis said to have taken place prior to Mr. Galanis' pretrial release on September 24, 2015 in the case pending before this Court. The sole act by Mr. Galanis said to have occurred after his pretrial release is a February 17, 2016 letter that Mr. Galanis wrote, openly and under his own name, to a tribal representative with copies to others, including a lawyer regarding tribal matters (Heather Thompson, an attorney at Greenberg Traurig). In that letter, he criticized a civil complaint already filed months earlier in this District by the Securities & Exchange Commission (SEC) against Atlantic Asset Management, LLC.

By the time Mr. Galanis was placed on pretrial release on September 24, 2015 in the case before this Court, the fraudulent scheme alleged in the new complaint was complete. Accordingly, by the time Mr. Galanis wrote the February 2016 letter, the alleged scheme was complete. The government has failed to show how this letter was in furtherance of that completed scheme or conspiracy. Nor did the government provide the Court with any case law in support of its position that the February 2016 letter constitutes an offense, let alone one that properly triggers the rebuttable presumption in 18 U.S.C. §3148(b). As set forth below, its position runs counter to established legal precedent.

B. The Court's Second Basis for Revoking Bail

As a second and separate basis for detention, this Court concluded that "Mr. Galanis is unlikely to abide by any condition or combination of conditions of release" because it deemed that "the indicted offenses" that are before this Court "were committed while Mr. Galanis was on probation following a conviction of a crime before the Honorable Manuel Real of the Central District of California." (Transcript, attached hereto as Exhibit B, at 47-48). This should not form the basis for bail revocation and detention because, as this Court itself noted at oral argument, this is not a new factor. (*Id.* at 47).

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[2] The complaint will be referenced hereafter as "new complaint".

[redacted] REDACTED

Significantly, when Mr. Galanis made an initial appearance on the new complaint in the CADC, the government sought to revoke his bail but did not make the argument that he violated probation imposed by the CADC. Nor did it make that argument before this Court. Nor has it asked Judge Real to revoke his probation. In summary, the issue of whether Mr. Galanis violated probation would involve an assessment of his position as a cooperator, both before and during his probationary period. It requires that facts be adduced at a sealed evidentiary hearing, and should not form a basis for revocation of his bail now by this Court.

Summary of Reasons for the Request for a Stay Pending Appeal

We respectfully request that the Court's order revoking bail be stayed pending appeal for the following five reasons.

First, the prosecution did not show probable cause that the offenses in the new complaint occurred, even in part, while Mr. Galanis was on pretrial release. It did not show he violated any condition of bail. It did not show – or even argue – that he is a flight risk; and it did not show that he presents a danger to the community. Furthermore, the Court's written order and the transcript do not adequately set forth the basis for finding probable cause that any offense set forth in the new complaint was committed, even in part, while Mr. Galanis was on pretrial release. The order and the transcript do not include any findings regarding flight risk or danger to the community other than the Court's conclusion stated in the record that "[i]t is a danger to have someone committing the crime of conspiracy to commit securities fraud while on release." (Exhibit B at 48).

Second, with respect to the Court's alternative basis for revoking bail and ordering detention, the issue of whether the indicted offenses pending before this Court were allegedly committed while Mr. Galanis was on probation is not a new factor, but was a factor when bail was originally set. Furthermore, it is a matter that the prosecution could have raised in the CADC, which was not only the district where probation was imposed under a sealing order but also the district where Mr. Galanis was arrested and brought before the court for an initial appearance on the new complaint and an initial determination regarding detention.[3] Significantly, the prosecution chose *not* to make that argument, either in the CADC or to this Court, presumably because it is not a new factor. It has also chosen *not* to ask Judge Real of the CADC to revoke probation. Accordingly, we submit that the second basis cited by the Court is not a proper basis for revocation of bail under §3148.

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[3] The Magistrate in the CDCA denied the government's motion to detain Jason Galanis under §3142.

Third, we submit that a stay pending appeal is appropriate because of the disparity of treatment regarding Jason Galanis in comparison to similarly situated co-defendants. In the case pending before this Court, there are three defendants who are charged in the new complaint: Jason Galanis, his father John Galanis, and Gary Hirst. All three are charged with the same conspiracy in the new complaint. If one of them purportedly committed an act in furtherance of the conspiracy while on pretrial release in the case before this Court, that presumably would bear on the bail status of all of them. The government, however, elected not to seek to revoke the bail of co-defendant Gary Hirst. Although the prosecution did move to revoke the bail of John Galanis, this Court denied the motion. In short, only Jason Galanis has had his bail revoked.

Fourth, we submit that a stay pending appeal is appropriate because, in seeking to revoke Jason Galanis' bail, the prosecution set out to poison the well with documents that it intentionally did not show the defense in advance so that defense counsel could not properly examine the documents and fully and thoroughly respond in court. The prosecution emphasized that one of the documents – a series of text messages that were redacted, at least in part, and discussed out of context – purportedly showed threatening and obstructionist behavior. Although the texts are not listed by the Court as a basis for detention – possibly because the defense asked that the recipient be produced as a witness if those were taken into account – the Court read the text messages and asked questions which showed that it found certain texts troubling.[4] (*See* Exhibit B at 34-36). In short, the prosecution submitted these texts as surprise evidence so that the defense would be unable to prepare properly to rebut the evidence and with the clear intent of influencing the Court. The presumption in §3148 is a rebuttable one. As the prosecution noted in its argument, it submitted these text messages in order to make the argument that the presumption was unrebuttable in this case. (*See* Exhibit B at 5, 8-9 ["we submit, in light of some evidence I am going to discuss regarding obstructive and threatening conduct engaged in by this defendant, that that presumption cannot be rebutted"; "we think that [rebuttable] presumption cannot be overcome in this circumstance, given evidence of … obstructive and threatening conduct that occurred, in large measure, during the period of pretrial release."]). But by foreclosing the defense's ability to rebut the presumption – by keeping the text messages as a surprise, redacting the document with no complete document to compare, and producing no witness – the government handicapped the defendant and denied him due process. It prevented him from properly rebutting the presumption, and it intentionally sought to influence the Court with improperly presented prejudicial evidence.

Last, we submit that there are conditions, singly or in combination, that could assure the safety of the community during a stay pending appeal. As noted during oral argument, one such condition could require that Mr. Galanis not engage in business transactions on behalf of clients or customers while on pretrial release.

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[4] The government also introduced as surprise evidence an email that it claimed showed Mr. Galanis had purportedly failed to report his association with a particular entity which appears to be only a domain name, not an entity. This evidence was also improperly introduced without a witness but was apparently discounted by the Court.

The New Complaint Fails to Show Probable Cause That the Alleged Offenses Occurred While Jason Galanis Was on Pretrial Release

The Court accepted the prosecution's central argument that there was probable cause to believe Jason Galanis committed a new offense while on pretrial release. The government argued that a finding of probable cause triggered a rebuttable presumption under 18 U.S.C. §3148 that no combination of conditions would assure that he would not pose a danger to the community. The Court accepted that argument, finding that:

> evidence … as to the most recent conduct leads me to believe there is no combination of conditions which protects the public from further conduct by this individual, which would represent a danger to that community. It is a danger to have someone committing the crime of conspiracy to commit securities fraud while on release.

(Exhibit B at 48).

The government's argument, however, centered solely on the allegations in the new complaint. It produced no additional evidence, other than the improper evidence of the text messages and email noted above. Although the Magistrate who signed the new complaint may have found probable cause to believe a crime was committed, that determination would have been made on the totality of the circumstances, not with regard to one specific paragraph (namely, ¶63) in a 45-page complaint. There is no specific finding of probable cause that Jason Galanis committed an act of fraud by sending a letter, openly and under his own name, to a tribal representative, in which he contested an SEC civil complaint that had been publicly filed against another entity. The new criminal complaint provides no basis for finding that the letter was in furtherance of a conspiracy to defraud, let alone in furtherance of a purported scheme that had already been completed.

The Court stated on the record as follows:

> the letter appears to have as its intent and purpose trying to dissuade the recipient from taking any action that would uncover or cast further attention upon the scheme. "The SEC has declared the bonds dubious, in part because they have jumped to the conclusion, based on the most superficial incomplete information, that Thorsdale has diverted money for its own benefit. This is without a doubt a false assumption."
>
> The statements made by [the agent in the new complaint] indicate that statement is untrue. I find the statements made in the [new] complaint to be internally consistent … and supports a finding that there is probable cause to believe that Jason Galanis committed the crimes of securities fraud and … other crimes … in part during the time he was on release in this case.

(Exhibit B at 47).

Even if the February 2016 letter were incorrect – or untrue – the new complaint does not make out an allegation that it constitutes a federal offense. The civil complaint that Mr. Galanis railed against in his letter had been publicly filed by the SEC in this District months earlier. In short, the alleged scheme was already "uncovered" by the public SEC civil complaint and had already drawn public attention. The idea that a defendant may have his bail revoked for a spirited letter contradicting the SEC is troubling. Equally troubling is the idea that the government can seek bail revocation under §3148 on the basis of conclusory statements by a federal agent in a criminal complaint that a released defendant's letter contradicting public allegations in a civil case constitutes criminal conduct in furtherance of an alleged scheme completed before his pretrial release.

The government did not provide the Court with legal precedent for its position. Research has not disclosed any case in this or any other Circuit where, as here, a defendant on pretrial release has had bail revoked on the basis of a complaint alleging that a letter vigorously disputing a public civil complaint during the period of pretrial release constituted a criminal act. Nor has research disclosed a case where, as here, a court has revoked bail on the ground that such a letter was deemed to constitute an act in furtherance of a conspiracy.

Established legal precedent is to the contrary. Even if the February 2016 letter to a tribe member is deemed to be, in the words of the Court, "keep[ing] up the pretense that everything is as it should be" (Exhibit B at 25) – and we maintain that was not the purpose – that would not constitute an act in furtherance of the conspiracy. It is well settled that a conspiracy cannot deemed to be lengthened to include steps taken after the central purpose has been accomplished even where such steps are taken for concealment or cover-up. Specifically, the Supreme Court stated long ago in *Grunewald v. United States*, 353 U.S. 391, 405 (1957):

> We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because ... the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished. ... [A] vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime.

Grunewald held that acts of concealment after the purpose of the conspiracy was completed could not extend the statute of limitations. If acts of concealment do not extend the life of a conspiracy after the main objective has been for attained for purposes of lengthening the statute of limitations, it follows that the government may not here try to extend the life of the conspiracy as a means of trying to shoehorn the February 2016 letter into the period of pretrial release and thereby trigger the rebuttable presumption under §3148(b), using the lowest possible standard: probable cause.

More recently, in *United States v. Kilkenny*, 493 F.3d 122, 129 (2d Cir. 2007), the Court of Appeals addressed a question posited by this Court about the February 2016 letter when it asked: "Isn't that a statement during and in furtherance of a conspiracy which includes as its object the defendants getting to keep the money that was misappropriated?" (Exhibit B at 25).

Kilkenny was a case in which the Second Circuit had to determine when a bank fraud scheme ended so it could apply the appropriate version of the sentencing guidelines. It refused to extend the life of a bank fraud scheme to include retaining the proceeds, and stated as follows:

> The government insists that, by failing to make payments on the fraudulently obtained loan, appellant extended the life of the illegal plan through his enjoyment of the proceeds. Adopting this approach would go too far, potentially extending the offense of bank fraud indefinitely. No doubt, the vast majority of bank fraud schemes entail not only obtaining but also retaining the ill-gotten gains. But when the proceeds of a criminal venture are spent may not be viewed as part of a plan to defraud. To rule otherwise and hold that failure to repay a fraudulently obtained bank loan constitutes conduct for the offense of bank fraud would extend the life of the offense so indefinitely as to render the *ex post facto* prohibition ineffective. The Supreme Court has cautioned against such a result in other contexts. *See Grunewald v. United States*, 353 U.S. 391, 402, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957) (holding a conspiracy to conceal should not be inferred from acts of concealment because "every conspiracy will inevitably be followed by actions taken to cover the conspirators' traces" and the opposite result would "extend the life of a conspiracy indefinitely").

493 F.3d at 129 (citations omitted).

In sum, the Second Circuit has made clear that a conspiracy may not be extended to include acts deemed rooted in maintaining a pretense in order to retain the proceeds of a completed scheme. Here, where the new complaint makes clear that the scheme to issue and sell tribal securities purportedly in order to misappropriate funds was completed prior to February 2016, the letter described in ¶63 does not extend the life of the conspiracy to make the offense one that took place after pretrial release conditions were imposed on September 24, 2015.

A Stay Pending Appeal is Appropriate Where Similarly Situated Defendants Have Not Had Their Bail Revoked or Been Detained

In the case pending before this Court, there are three defendants who are also charged in the new complaint: Jason Galanis, his father John Galanis, and Gary Hirst. All three are charged with engaging in the same conspiracy in the new complaint. However, the sole defendant whose bail has been revoked is Jason Galanis.

The distinction among the defendants could not – and should not – be based on the one act alleged to have been performed by Jason Galanis during pretrial release: namely, the letter he wrote in February 2016. If that letter is deemed to constitute an act in furtherance of the conspiracy – and, as set forth above, we maintain that it was not – then this Court would not have released the other two defendants, because they would be deemed to have shared in that act.

Accordingly, a stay of the Court's Order revoking bail and imposing detention would be appropriate.

A Stay is Appropriate Because the Prosecution Improperly Prevented the Defense From Rebutting the Presumption in 18 U.S.C. §3148

The prosecution improperly sought to prevent rebuttal of the presumption on which it relied when it invoked 18 U.S.C. §3148(b). (*See* Exhibit B at 5, 8-9). It chose *not* to call a witness to introduce prejudicial documents that it sprung by surprise. The most prejudicial of those documents was redacted with no full copies provided and was discussed out of context. Its purpose was to convince the Court that Mr. Galanis engaged in threatening and obstructive behavior while on pretrial release.

The prosecution articulated no reason why it refused to show the defense in advance the documents on which it relied. The reason, however, is clear. It did not want to give the defense the opportunity to which the defense is entitled under the statute: namely, to rebut the presumption in §3148(b). The prosecution wanted to ensure that the defense would be unprepared. While the Bail Reform Act does not require advance discovery, it does entitle the defense to an adversary hearing. *See United States v. Salerno*, 481 U.S. 739, 751, 754 (1987) ("Under the Bail Reform Act, the procedures by which a judicial officer evaluates the likelihood of future dangerousness are specifically designed to further the accuracy of that determination ... [and provide for] cross-examin[ation of] witnesses ....The numerous procedural safeguards detailed above must attend this adversary hearing.") The defense asked to have the witness in the prejudicial document produced; the prosecutor elected to call no witnesses, but it had already effectively planted seeds of concern as it had sought to do.

For all the reasons set forth above, Jason Galanis' procedural due process rights were violated. *See United States v. Abuhamra,* 389 F.3d 309, 322 (2d Cir. 2004) (in connection with §3143 bail hearing, court noted that "[p]articularly where liberty is at stake, due process demands that the individual and the government each be afforded the opportunity not only to advance their respective positions but to correct or contradict arguments or evidence offered by the other.") Also violated were his substantive due process rights under the Bail Reform Act as applied to him. *See Salerno, supra,* 481 U.S. 739.

Conclusion

For all the reasons stated here and in prior proceedings, defendant Jason Galanis respectfully requests that the Court stay its order revoking bail and detaining Jason Galanis pending appeal.

Respectfully submitted,

Marion Bachrach

Encl.

Cc: Assistant U.S. Attorney Brian Blais